

APPEAL NO. 023250
FILED JANUARY 16, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 25, 2002. The hearing officer resolved the disputed issues by deciding that the respondent/cross-appellant's (claimant) average weekly wage (AWW) is \$458.00; that the appellant/cross-respondent (carrier) waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021; that because the carrier waived the right to contest compensability, the claimant, as a matter of law, sustained a compensable injury on _____; and that because the carrier waived the right to contest compensability, the claimant, as a matter of law, had disability beginning July 24, 2002, and continuing through the date of the hearing. The carrier appealed, arguing that given the hearing officer's determination that the claimant did not sustain an injury, the carrier's failure to contest compensability cannot create an injury. Additionally, the carrier appealed the hearing officer's disability determination. The claimant cross-appealed the hearing officer's injury determination on sufficiency of the evidence grounds. The appeal file does not contain a response from either the claimant or the carrier. The parties stipulated that the AWW is \$458.00 and that fact has not been appealed and has become final. Section 410.169.

DECISION

Affirmed, as reformed.

The claimant testified that he injured his right knee in the course and scope of his employment on _____, while working in an attic. The claimant testified that he sought medical treatment from Dr. S on July 18, 2002. In a letter dated August 2, 2002, Dr. S opined that a MRI (dated August 1, 2002) reflected "some abnormal signal in the lateral meniscus and a definite effusion with no cruciate ligament tears but possibly some cartilaginous surface injury to the medial femoral condyle." The claimant testified that he worked for the employer until July 23, 2002. There is conflicting evidence of whether the claimant injured his right knee in the course and scope of employment or whether the claimant injured his right knee playing softball.

The carrier argues that its failure to timely dispute the claimed injury was not a waiver, citing Continental Casualty Co. v. Williamson, 971 S.W.2d 108, 110-111 (Tex. App.—Tyler 1998, no pet. h.). The Appeals Panel has previously recognized that Williamson is limited to situations where the claimant did not have an injury. In this case, Dr. S opined that the claimant had sustained a "new injury" to his right knee. Although the hearing officer determined that the claimed injury was not in the course and scope of employment, it is relatively undisputed that the claimant has an injury. The Appeals Panel has held that if the claimant has established that a condition meets the definition of injury under Section 401.011(26), it does not matter that the cause of the injury may be outside the course and scope of employment because causation is no

longer in dispute when a Payment of Compensation or Notice of Refused/Disputed Claim Interim (TWCC-21) has not been timely and properly filed. Texas Workers' Compensation Commission Appeal No. 022608, decided November 25, 2002. Accordingly, Williamson cannot be relied upon to support the determination that the carrier did not waive its right to contest compensability of the injury.

The hearing officer reviewed the evidence and determined that the carrier did not timely notify the claimant and the Texas Workers' Compensation Commission that it would either pay or dispute benefits within seven days as required by Section 409.021. (See *also* Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002)). The evidence shows that the carrier first received written notice of the claimed injury on July 24, 2002, and that the carrier filed two TWCC-21s on August 5, 2002. One TWCC-21 reflects that the carrier placed an "X" next to temporary income benefits, and the other TWCC-21 reflects that the carrier disputed the claimed injury. Neither TWCC-21 was timely filed within seven days of first receipt of written notice of the claimed injury. The evidence sufficiently supports the hearing officer's determination that because the carrier waived the right to contest compensability, the claimant, by operation of law sustained a compensable injury on _____.

The hearing officer determined that due to the claimed injury the claimant "was unable to obtain and maintain [sic retain] employment" at the preinjury wage beginning on July 23, 2002, and continuing through the date of the hearing. That finding is supported by the evidence. In that the carrier waiver has made the claimed injury compensable by operation of law, the conclusion that the claimant had disability is affirmed. We do reform the hearing officer's Conclusion of Law No. 6 to omit the words "as a matter of law" because disability is dependent on the hearing officer's determination that the claimant had some period of an inability to obtain and retain employment. The carrier waiver of the right to contest compensability pursuant to Section 409.021 and Downs does not extend to automatically waive into a period of disability.

We have reviewed the complained-of determinations. There was conflicting evidence on the injury and disability issues. The hearing officer is the sole judge of the weight and the credibility to be given the evidence. Section 410.165(a). The hearing officer resolved the conflicts and inconsistencies in favor of the claimant and she was acting within her province as the fact finder in so doing. Nothing in our review of the record reveals that the challenged determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to disturb those determinations on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed, as reformed.

The true corporate name of the insurance carrier is **STATE FARM FIRE AND CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**MR. RON DODD
8900 AMBERGLEN BOULEVARD
AUSTIN, TEXAS 78729-1110.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Michael B. McShane
Appeals Panel
Manager/Judge